DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiffs: FRIENDS OF DENVER PARKS, INC., a Colorado non-profit corporation, STEVE WALDSTEIN, an individual, and ZELDA HAWKINS, an individual. **v.** **Defendants:** CITY & COUNTY OF DENVER, a municipal corporation; and SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER, a public entity; and DEBRA JOHNSON, in her capacity as clerk and recorder of the City and County of Denver.	**▲COURT USE ONLY▲**
Plaintiff's Attorneys: John Case, Esq. Atty reg. # 2431 Benson & Case, LLP 1660 So. Albion Street, Suite 1100 Denver, Colorado 80222 Phone Number: (303) 757-8300 FAX Number: (303) 753-0444 E-mail: case@bensoncase.com	Case No.: 2013CV032444 Ctrm.: 376 Judge: Honorable Herbert L. Stern, III
PLAINTIFFS' OPENING BRIEF	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND CHARTER:

STATUTES AND ORDINANCES:

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether Ms. Johnson abused her discretion and violated the express terms of the Denver City Charter in rejecting Plaintiffs' Petition on the ground that Ordinance 170 was "administrative" rather than "legislative" in character.

STATEMENT OF THE FACTS

Plaintiffs brought this action for Rule 106 review against Denver Clerk and Recorder Debra Johnson (Ms. Johnson) in order to protect 10.77 acres of Hampden Heights North Park (HHNP) from unlawful development. On April 1, 2013, Denver City Council enacted two ordinances subdividing HHNP into two parcels. Ordinance 168 designated the 16 acre northern parcel a part of Paul A. Hentzell Park. (Record Item 2, attached hereto as Appendix 1). Ordinance 170 approved a contract between the City and School District No. 1 in the City and County of Denver (DPS) under which the City traded the 10.77 acre southern parcel to DPS in exchange for a building at 1330 Fox Street. (Record Item 3, attached hereto as Appendix 2). DPS intends to build a school on the southern parcel in January 2014.

Plaintiffs opposed the adoption of Ordinance 170 at a City Council meeting on April 1, 2013. On May 20, 2013, Plaintiffs submitted a petition to Ms. Johnson for approval as to form. The Petition sought to repeal Ordinance 170 by referendum. (Record Item 4, Proposed Form of Referendum Petition). Ms. Johnson rejected the Petition on the ground that "[b]ecause Ordinance No. 170 concerns an administrative matter of approving or disapproving a real estate transaction, it is not subject to referendum under Section 8.3.1 of the Denver Charter." (Record Item 8, Letter of Clerk and Recorder to Petitioner's Committee dated 5/22/2013). Ms. Johnson further advised that Plaintiffs "[could] institute proceedings with the appropriate court" if they were dissatisfied with her decision. (*Id.*)

On July 1, 2013, Plaintiffs submitted the completed Petition with 6,664 signatures of Denver registered voters, more than the 6,129 required for a referendum. Ms. Johnson refused to count the signatures and accused Plaintiffs of violating Denver Charter § 8.3.2(C) by "circulating the petition and gathering signatures without the clerk's approval." (Record Item 12, Letter of Clerk and Recorder to Petitioner's Committee dated 7/3/2013). Plaintiffs then filed their Revised Third Amended Complaint seeking Rule 106 review of Ms. Johnson's actions in rejecting their Petition and refusing to count the signatures of Denver voters.

SUMMARY OF ARGUMENT

Ms. Johnson abused her discretion and violated the express terms of the Denver City Charter in rejecting Plaintiffs' Petition because Ordinance 170 was "legislative" for referendum purposes. To begin, Ordinance 170 constituted a general declaration of Denver zoning and land use policy— a quintessentially legislative activity. Second, by requiring voter approval for transfers of Denver park property, the City Charter itself implicitly recognizes that such transfers are legislative action. Third, Ordinance 170 and Plaintiff's Petition to counteract it constituted new declarations of public policy and, thus were legislative under the legal tests promulgated by Colorado courts. Finally, as an "enacted ordinance," Ordinance 170 was subject to repeal by referendum because the City Charter extends the right of referendum to all "enacted ordinances."

ARGUMENT

I. MS. JOHNSON ABUSED HER DISCRETION AND VIOLATED THE EXPRESS TERMS OF THE DENVER CITY CHARTER IN REJECTING PLAINTIFFS' PETITION ON THE GROUND THAT ORDINANCE 170 WAS "ADMINISTRATIVE" RATHER THAN "LEGISLATIVE" IN CHARACTER.

Article V, Section 1 of the Colorado Constitution vests the legislative power of the state in the general assembly, but reserves to the people the twin powers of initiative and referendum. COLO. CONST. Art. V § 1(9). The right of the people to propose initiatives and referendums is

fundamental. *Bernzen v. City of Boulder*, 525 P.2d 416, 419 (Colo. 1974) (describing initiative and referendum as "fundamental rights"). Accordingly, "limitations on the power of [initiative and] referendum must be strictly construed and should not be extended by either implication or inference. *Brooks v. Zabka*, 450 P.2d 652, 655 (Colo. 1969).

Relying on Denver Clerk and Recorder Rule 6.4.5, Ms. Johnson purported to short-circuit the people's right to vote on the sale of Denver park property by contending that City Council was acting in an administrative, rather than legislative capacity when it enacted Ordinance 170, the target of Plaintiffs' proposed Petition. (Record Item 8, Letter of Clerk and Recorder to Petitioners Committee dated 5/22/2013) Ms. Johnson ruled that the Ordinance 170 was not subject to referendum because it "concerne[d] an administrative matter of approving or disapproving a real estate transaction" rather than a legislative issue. (*Id.*) Ms. Johnson's rationale for rejecting Plaintiffs' Petition fails for four reasons. Each is discussed separately in the material that follows.

A. Ordinance 170 constituted an unprecedented change to Denver's land use policy regarding parks and, thus, was "legislative."

While the powers of initiative and referendum are broad, they are not unlimited. *City of Idaho Springs v. Blackwell,* 731 P.2d 1250, 1253 (Colo. 1987). Article V of the Colorado Constitution has long been construed to vest only legislative power directly in the people. *Id.* As a result, the powers of initiative and referendum apply to only those acts that are legislative in character. *Id.* The people may not use initiatives and referendums to exercise administrative or judicial powers. *Id.*; *Vagneur v. City of Aspen,* 295 P.3d 493, 504 (Colo. 2013).

In *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), the Colorado Supreme Court declared that zoning decisions are legislative for purposes of referendum because such decisions are permanent in nature and signify general declarations of public policy concerning land use. *Id.*

at 303-04. Thus, if the ordinance to which Plaintiffs' petition was directed qualifies as a zoning decision, the ordinance was legislative and subject to repeal by referendum.

For forty-six years before Council adopted Ordinances 168 and 170, all twenty-six acres of HHNP was zoned "Public —Open Space—Park." As a result of the two ordinances, the park was subdivided into two parcels. The northern parcel was designated a part of Paul H. Hentzel Park and the southern parcel was transferred to DPS for use as the site of a public school. By designating the southern parcel for use as a public school, Council effectively rezoned the southern parcel to abrogate its previous designation as a public park. Accordingly, Ordinance 170 was a zoning/land use measure and, therefore, legislative.

That Ordinance 170 constituted a *de facto* rezoning of the southern parcel is illustrated by then zoning classifications employed by the City's official zoning map. By law, the official zoning map maintained by the Department of Community Planning and Development controls zoning classifications in Denver. Denver Mun. Code § 59-4(a). Currently, the map designates all twenty-six acres of HHNP as "OS-A," meaning "Open Space – Public Park." (Zoning Map, attached hereto as Appendix 3; Denver Zoning Code Summary of Districts, attached hereto as Appendix 4). If the actions of City Council are permitted to stand, the southern parcel will be used by DPS as the site of a public school. Once the school is built, the southern parcel will no longer be a park. Accordingly, its zoning classification will have to be changed from OS-A to a different classification, such as "CMP-EI" (Campus – Educational Institution). (Denver Zoning Code Summary of Districts, attached hereto as Exhibit 4). That the parcel's zoning classification will have to be changed is a strong indication that Ordinance 170 was a zoning decision subject to repeal by referendum.

Plaintiffs recognize that, as a general rule, "the sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property" does not amount to "a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability." *Vagneur,* 295 P.3d at 510. However, the general rule does not apply here. City Council's actions in transferring HHNP to DPS bypassed City Charter § 2.4.5 and, in doing so, reversed City land use policy regarding the sale/transfer of all Denver parks. Accordingly, Counsel' actions affected not only the 10.77 acres of HHNP mentioned in Ordinance 170, but all Denver parks.

HHNP is a park by common law dedication and a park "belonging to the City as of December 31, 1955" for purposes of City Charter § 2.4.5. HHNP is a park by common law dedication because after acquiring title to the property in 1936, the City consistently engaged in conduct which evidenced intent to dedicate HHNP for use as a public park, and the citizens of Denver accepted that dedication by using HHNP as a park for a period of more than seventy years. HHNP is a park "belonging to the City as of December 31, 1955" because the City acquired the property prior to 1955 and recognized the property as a park.

Because HHNP is a park by common law dedication and a park "belonging to the City as of December 31, 1955" the City's actions in transferring HHNP to DPS were in violation of both common law trust principals and the express terms of City Charter § 2.4.5, which explicitly provides that park property may not transferred to third parties without voter authorization. Council's actions in this case were wholly unprecedented. Moreover, those actions most assuredly were not limited to the transfer "of a particular parcel of city-owned property." Conversion of HHNP from a park to a school will have wide-ranging consequences for all Denver park land.

In addition to constituting a *de facto* rezoning of the southern parcel, Ordinances 168 and 170 were a *de facto* amendment to Denver zoning and land use policy city-wide. Given the precedent this case will set, from this point forward, City Council will be free to sell or transfer any parcel of Denver park property without a vote of the people, and to redesignate the transferred land in any way it sees fit. Actions such as Ordinance 170 that have wide-ranging effects upon a city's extant land use policy are the very essence of legislative action. Accordingly, Ms. Johnson abused her discretion in rejecting Plaintiffs' Petition on the ground that Ordinance 170 was "administrative."

B. The City Charter itself recognizes that Ordinances such as Ordinance 170 are "legislative."

Where a city charter imposes a voter approval requirement as a "check" on city council's authority to change the status of land, the voter approval requirement is "an implicit recognition that changes in [land status] are, at least under the City Charter, legislative in character." *Vagneur*, 295 P.3d at 514 (Eid, J., dissenting). Given the case law holding that referendum does not apply to "administrative" matters, it is "highly unlikely" that any city would limit council's authority by imposing a voter approval requirement "for a purely administrative matter when such a 'check' is not required (or even contemplated) by separation of powers principles." *Id.*

Here, it is undisputed that the City Charter imposes a voter approval requirement upon the sale of park land:

> **Without the approval of a majority of those registered electors voting** in an election held by the City and County of Denver, **no park or portion of any park belonging to the City as of December 31, 1955, shall be sold or leased at any time**, and no land acquired by the City after December 31, 1955, that is designated a park by ordinance shall be sold or leased at any time, provided, however, that property in parks may be leased for park purposes to concessionaires, to charitable or nonprofit organizations, or to governmental jurisdictions. All such leases shall require the approval of Council as provided for in Article III of this Charter. No land acquired

> by the City after December 31, 1955, shall be deemed a park unless specifically designated a park by ordinance.

City Charter § 2.4.5 (emphasis added).

The very fact that the Charter's drafters included a "check" in the form of a voter approval requirement on Council's ability to transfer park land is a powerful indicator that the City itself considers the transfer of park land a legislative act. It would be wholly illogical for the City to hamstring itself by imposing a voter approval requirement upon an act it considered purely administrative. City Charter § 2.4.5 declares the City's implicit recognition that actions such as Ordinance 170 are legislative in nature. Plaintiffs respectfully ask that this Court take the City at its word and find that Ms. Johnson abused her discretion in decreeing that Ordinance 170 was merely "administrative."

C. Ordinance 170 and the action proposed by Plaintiffs' Petition announced new public policy and, thus, were legislative for purposes of initiative and referendum.

Whether an action is legislative or administrative is "largely an *ad hoc* determination" based upon applying general considerations to a particular action. *Vagneur,* 295 P.3d at 506. In assessing whether an ordinance is legislative or administrative, one test is "whether the legislation announces new public policy or is simply the implementation of a previously declared policy." *Blackwell,* 731 P.2d at 1254. Two guidelines assist in making this determination. First, "acts that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are [administrative]." *Id.* Second, acts "necessary to carry out existing legislative policies or purposes" are administrative, while those that constitute "declaration[s] of public policy" are legislative. *Id.*

i. Ordinance 170 and the action proposed by Plaintiffs' Petition were "legislative" because they concerned subjects that were permanent in character rather than temporary in effect.

For referendum purposes the use of the term "permanent" signifies "a public policy of general applicability because permanent enactments are more likely to involve policy considerations." *Blackwell,* 731 P.2d at 1254. Here, Ordinance 170 and the action proposed by Plaintiffs' Petition constitute new declarations of public policy and, thus, were "permanent."

Ordinance 170 purported to authorize the transfer of City park land to DPS. The action proposed by the Plaintiffs' Petition was to reverse that transfer. Both the Ordinance and the Petition 16ituted declarations of public policy. Through Ordinance 170, Council attempted to institute a City-wide policy under which it could bypass Charter § 2.4.5 and transfer Denver park property without a vote of the people. The desired effect of Plaintiffs' Petition was to reverse that policy and, in doing so, preserve the park status of HHNP, promote the protection of Denver's natural and ecological resources through the preservation of the City's parks and natural areas, and safeguard the people's right to vote on sales of Denver park property. These wide-ranging policy objectives distinguish Ordinance 170 and Plaintiffs' petition from other actions that Colorado courts have declined to recognize as "legislative" in the past.

Take for example the initiatives proposed in *Vagneur v. City of Aspen*, 232 P.3d 222 (Colo. App. 2009), *aff'd,* 295 P.3d 493 (Colo. 2013). In *Vagneur*, the Aspen City Council decided to expand entrance to the city via the western highway and began considering how best to accomplish that expansion. *Id.* at 224. Council considered several different designs before selecting its preferred alternative. *Id.* Displeased with the counsel's choice, citizens of Aspen filed two petitions setting forth substitute designs for the expansion. *Id.* at 225. Council opposed both petitions on the ground that the actions proposed were administrative. *Id.* at 226.

The Court of Appeals and Colorado Supreme Court determined that, because the desired effect of the petitions was merely to supplant the counsel's selected design with a design more

amenable to the petitioners, the petitions were administrative in character and, thus, not proper for initiative. 295 P.3d at 507-09. Drawing on the *Blackwell* decision, the *Vagneur* court held that, while the initial decision to construct a new entrance to the city was a public policy decision of general applicability and, thus, legislative for purposes of initiative and referendum, having approved that decision, the voters could not, through an initiative, revise the counsel's subsequent choices concerning how best to implement the construction. Such decisions are administrative in character and, thus, not proper for an initiative. *Id.* at 509-10.

This case is distinguishable from *Vagneur.* Here, unlike in *Vagneur* where the purpose of the initiative was simply to replace city council's selected design with a design preferred by the people, Ordinance 170 and Plaintiffs' Petition are addressed to broad issues of land use policy as applied to Denver parks. Ordinance 170 was not a mere administrative action affecting a single parcel of land but rather a *de facto* declaration by City Council that Section 2.4.5 of the City Charter no longer applies to park land acquired before December 31, 1955. Plaintiffs' petition was addressed not merely to the 10.77 acres transferred by Ordinance 170 but rather to protection of all of the City's parks. Put simply, through their petition, the Plaintiffs' hoped to send a clear message to the Denver City Council that the citizenry value their park lands and open space and will not allow their elected officials to bargain away those lands through back-room deals executed by city officials.

Similar distinctions can be drawn between the Plaintiffs' case and *Blackwell.* In *Blackwell*, the Idaho Springs City Council enacted an ordinance providing for a new city hall. 731 P.2d at 1251. Council then approved a motion authorizing the purchase of a particular piece of property to serve as the site of the new city hall, and the moving and renovation of a building to serve as the structure for the new city hall. *Id.* Dissatisfied with Council's selections, citizens

of Idaho Springs filed two initiatives seeking to repeal the city council's actions authorizing the purchase of the property and the moving of the building. *Id.* at 1251-52. Council opposed both initiatives on the grounds that the actions proposed were administrative. *Id.*

The court determined that:

> Because the proposed ordinance only excluded a specific piece of real estate and a specific building from a variety of choices available to the city to implement the previously declared policy of securing and building a city hall, they did not relate to a policy declaration of general applicability and therefore were not permanent in nature.

Vagneur, 232 P.2d at 228 (explaining *Blackwell*); *Blackwell*, 731 P.2d at 1254-55.

Ordinance 170 and the actions proposed by Plaintiffs' petition are distinguishable from the actions at issue is *Blackwell*. Unlike in *Blackwell,* where the purpose of the petition was to exclude only a single site from the range of options available to the counsel for use as the new city hall, the purpose and effect of Ordinance 170 and Plaintiffs' Petition were much broader. Ordinance 170 was intended to subject, not just the southern parcel of HHNP, but all Denver park property to sale by the City without a vote of the people. Similarly, Plaintiff's petition was intended to protect not just HHNP, all Denver park property from sale by the City without a vote of the people. Accordingly, unlike in *Blackwell*, the actions at issue here were not limited to a single parcel of property.

Because Ordinance 170 and Plaintiffs' Petition directly impact the underlying public policy goals of protecting parklands, preserving open space, and conserving ecological resources, the Ordinance and Petition are declarations of public policy and, thus, are "permanent" for purposes of initiative and referendum.

ii. <u>Ordinance 170 and the actions proposed by Plaintiffs' Petition were "legislative" because they constituted new public policy as opposed to acts necessary to carry out existing public policy.</u>

As noted above, the second guideline for assessing whether a proposed ordinance is legislative or administrative for purposes of initiative and referendum looks to whether the ordinance was necessary to carry out existing legislative policies or was a declaration of public policy in and of itself. *Vagneur,* 295 P.3d at 505. Both Ordinance 170 and the action proposed by Plaintiffs' petition were declarations of public policy in and of themselves and, thus, were legislative, for referendum purposes.

As detailed in the preceding sections, Ordinance 170 was Council's attempt to abrogate existing land use policy as to all park land acquired before December 31, 1955. Likewise, Plaintiffs' petition was a grassroots, citizen-initiated effort to restore and enforce existing land use policy regarding Denver parks. Accordingly, both the Ordinance and the Petition concern the establishment of generally applicable policy, and are not limited to "implementation" of extant policy.

In sum, because Ordinance 170 and the actions proposed by Plaintiff's petitions constituted new declarations of public policy, Ms. Johnson abused her discretion in concluding that both were "administrative" for referendum purposes.

D. **Ordinance 170 is subject to challenge and repeal via referendum because the City Charter renders the right of referendum applicable to any ordinance.**

The City Charter sets forth the right of referendum as follows:

> The people of the City and County of Denver reserve the right to propose and enact ordinances—by initiative; **to require that existing ordinances be referred to a vote** of the electorate—**by referendum**; and to recall elected officials.

Charter § 8.3.1 (emphasis added). Further:

> **An enacted ordinance** may be referred by petition of registered electors numbering at a minimum five (5) per cent of the total vote for the office of Mayor in the last election at which a Mayor was elected.

Id. § 8.3.4 (emphasis added).

A city may confer in its municipal charter a broader right of referendum than that set forth in the Colorado Constitution. *Burks v. City of Lafayette*, 349 P.2d 692 (Colo. 1960). Denver did so here. The Charter expressly provides that any "existing ordinances" may be challenged via referendum. The only qualification is that the petitioners challenge "[a]n enacted ordinance."

Ordinance 170 was indisputably an enacted ordinance. Council expressly designated it as such. That being true, Ordinance 170 can be challenged and repealed via referendum. The legislative-administrative distinction simply does not apply. The Charter authorizes referendum challenges as to all "existing ordinances."

Plaintiffs are aware of *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977). There, the Supreme Court interpreted an Aurora City Charter provision under which "all ordinances" could be challenged by referendum to mean that only "legislative" ordinances could be challenged by referendum. *Id.* at 1076-77. *Zwerdlinger* is distinguishable because the charter provision in that case excepted four types of ordinances from the general rule that "all ordinances" were subject to referendum. *Id.* at 1076. Here, the City Charter contains no such exceptions. Thus, in this case, the charter actually does provide for referendum on all ordinances, whereas the provision at issue in *Zwerdlinger* did not.

If this Court determines that *Zwerdlinger* is indistinguishable, then Plaintiffs' respectfully submit that *Zwerdlinger* was wrongly decided. The *Zwerdlinger* Court acknowledged the precept that a city may confer a broader right of referendum than the state constitution provides, but then violated every cannon of statutory interpretation to find that the drafters of the Aurora City

Charter did not mean what they wrote, but instead merely intended to confer a right of referendum coextensive with that in the state constitution.[1]

Put simply, the Charter provides that every "enacted ordinance" may be challenged by referendum, without consideration of whether the ordinance is "legislative" or "administrative." Ordinance 170 is an "enacted ordinance." Therefore, Plaintiffs are entitled to challenge the ordinance via referendum and Ms. Johnson abused her discretion in finding that Ordinance 170 was "administrative."

CONCLUSION

For the foregoing reasons Plaintiffs respectfully request that this court declare that Ms. Johnson abused her discretion in decreeing that Ordinance 170 was administrative rather than legislative for purposes of initiative and referendum.

Respectfully submitted October 10, 2013.

BENSON & CASE, LLP

s/John Case

John Case, # 2431

[1] Appellants understand that this Court may not disregard Colorado Supreme Court precedent. Appellants make the argument to preserve the issue for further appeal.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2013 a true and correct copy of the foregoing PLAINTIFFS' OPENING BRIEF was served on the following:

Denver County District Court **VIA ICCES**
1437 Bannock Street
Denver, CO 80202

David W. Broadwell, Esq. **VIA ICCES FILE & SERVE**
Patrick Wheeler
Mitchel Behr
Assistant City Attorneys
1437 Bannock St. R#353
Denver CO 80202
Attorneys for Defendants City and County of Denver and Debra Johnson

John H. Kechriotis, Esq. **VIA ICCES FILE & SERVE**
Michael J. Hickman
Jerome A. Deherrera
Office of General Counsel
Denver Public Schools
900 Grant St. #401
Denver CO 80203-2996
Attorneys for Defendant Denver Public School District Number 1

s/Karen Corner
_____
Karen Corner